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No. 88-

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

CALIFORNIA LAND AND CATTLE COMPANY,
Petitioner,

VS.

AMSTAR CORPORATION, SPRECKELS
SUGAR DIVISION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

I

Should the rule of Societe Internationale v. Rogers be applied to the States?

II

Should procedural due-process rules be established to require clear orders in dismissals involving discovery by State Courts?

III

Should this Court review the interrelation between the Bankruptcy Act and State Court litigation involving parties subject to that Act?

IV

Should this Court review the constitutionality of the use of discovery procedure as an offensive weapon to avoid trial on the merits?

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OPINIONS BELOW

Appendix A is the order of dismissal of the Superior Court. Appendix B is the ruling on the motion to vacate of the Superior Court. Appendix C is the opinion of the Court of Appeal. Appendix D is the order denying review of the

Supreme Court of the State of California, dated August 17, 1988

JURISDICTION

The order of the Supreme Court of the State of California denying review was dated August 17, 1988. Jurisdiction is evoked under 28 USC 1257.

STATUTORY PROVISION INVOLVED

The Bankruptcy Act and the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This case involves the dismissal of an action for failure by the sole stockholder to turn over records which were in the custody and control of the Trustee in Bankruptcy. The action is one for breach of a management contract. Amstar acted as a leasing agent for some 6,000 acres of irrigated agricultural land and handled all receipts and expenses, including the

accounting. No records were maintained by the stockholder and, in fact, except in a very limited sense, all records were maintained by Amstar.

The suit involved an allegation that Amstar, in violation of the terms of the contract, leased the land for $200 to $300 less than top market price. Considering the time and acreage involved, potential damages were in the millions.

Approximately a year after filing the complaint, California Land and Cattle Co. filed under the Bankruptcy Act. In the pertinent period, here, there was a Bankruptcy Trustee who under bankruptcy law acquired legal custody and control of all records and property of California Land and Cattle Co.

At the commencement of the period of importance in this case, the Trustee in Bankruptcy was the attorney of record in

this case (R180). During this period, while the Trustee in Bankruptcy was record attorney, Amstar subpoenaed the sole stockholder and president of California Land and Cattle Co. for his deposition, and in connection therewith the following request for documents was served:

> "Pursuant to Code of Civil Procedure 2019(a)(5), Mr. Mee is instructed to bring the following documents for production at the commencement of said deposition: 1. All files and documents relating to the negotiation of the April 6, 1976 Lease and Sublease and Water Supply Agreements (the Lease Agreement and Water Agreement). 2. All files of correspondence with Amstar from January 1, 1975 to the present relating "to the Lease Agreement and Water Supply Agreement. 3. All other files relating to the Lease Agreement and Water Supply Agreement. 4. All files relating to any farming or cattle operations conducted by California Land & Cattle and Pacific Land Management on the King City Ranches at any time after April 6, 1976."

Mee declined to have his deposition taken while he was not represented by counsel.

(This refusal was ultimately upheld by the Trial Court.) (R340). Almost immediately afterwards, Amstar moved to dismiss the action on the basis of refusal to grant discovery (R236). Contemporaneously, the Trustee in Bankruptcy applied to the Bankruptcy Court for permission to abandon the action and release the cause of action to Mee, personally, as an after-acquired bankruptcy asset (R308). This motion was granted by tne Bankruptcy Court by the following order:

> "It is HEREBY ordered that Stuart M. Kaplan, Trustee, be and hereby is authorized to abandon that action now pending in the Superior Court of Monterey County, State of California, entitled California Land and Cattle Company vs. Amstar Corporation, Spreckels Sugar Division, et al., Case No. 77162, to Tom Mee as Mr. Mee's individual, after acquired, property." (R242).

The Trustee in Bankruptcy attorney (attorney of record in this action) failed to take any action to defend against the

motion to dismiss, and filed a withdrawal as attorney of record immediately prior to the hearing on the motion (R238).

The over 1,000 pages of record and the many Court appearances in this case are all concerned with Amstar's attempts to have its motion to dismiss for failure to provide discovery, under the California equivalent of Rule 37 under the Federal Rules of Civil Procedure, sustained. The documents not produced, as the above quoted discovery request indicates, were the records of California Land and Cattle Co.

Since the Trial Court and the Court of Appeal both treated Mee and the Trustee in Bankruptcy as having an identity of interest, and since they held Mee (the Real Party in Interest) as responsible for producing the records controlled by the Trustee in Bankruptcy, the relationship between the Trustee and Mee becomes important.

At the time of dismissal in this case, the Trustee in Bankruptcy had submitted a plan of reorganization in bankruptcy proceeding, which included giving title to the agricultural property involved in the lawsuit to Amstar (R979). Prior counsel for Mee had accused the Trustee of taking a bribe (R336). The Trustee's attorney advised present counsel in writing that proceeding with the litigation "is running directly at cross purposes with those of the Trustee and the best interests of California Land and Cattle Company."(R391-392). The Trustee would have been subject to criticism, justifiably, for abandoning the action if the litigation proved successful. Making Mee responsible for the Trustee's conduct, therefore, seems to violate basic standards of fairness.

Predictably, the Trustee in Bankruptcy refused to voluntarily turn over any

records of California Land and Cattle Co., and formally advised Amstar that it would require a subpoena (R385). This Amstar refused to do, and renewed its move to dismiss. Petitioner then moved the Trial Court for an order directing the Trustee to cooperate, which was denied (R657).

On August 22, 1986, the Court by an oral order gave petitioner 30 days to secure the California Land and Cattle Co. records (R837). The minute order made some reference to interrogatories, however interrogatories had been answered and the only information not supplied was that not in the possession or control of Mee. Petitioner's counsel then requested Amstar's counsel to set a time for the Trustee's deposition, and to identify, specifically, any documents it desired (R912). Counsel for Amstar did not respond. Since the Trustee refused to appear, vol-

untarily, he was formally served in the exact language of respondent's request for discovery. Trustee appeared at the deposition on September 26 and refused to produce the records on the grounds the request was too broad and that he was subpoenaed individually rather than in a representative capacity (R194).

Mee in the period here in question suffered from a disease called Myasthenia Gravis (R964). At the first day of his deposition, he had an attack and the deposition was recessed. The deposition was then rescheduled and Mee testified for two days. The last day recessed for the convenience of the defense's counsel since he had other commitments (R964). The deposition was then rescheduled by agreement of counsel to October 8, 1986. On October 7, plaintiff's counsel was informed that Mr. Mee had a possible cardiac incident

and was required to take tests and could not appear at his deposition. Defense's counsel was immediately informed and the deposition was recessed (R976).

On October 10 at the hearing on the motion to dismiss, Mr. Mee's failure to appear at the deposition was cited as an additional ground for dismissal. The Trial Court then granted the motion to dismiss on the dual grounds of the records and Mee's failure to appear (R1018).

Appeal was then taken to the California Court of Appeal, which sustained the Trial Court, holding that the records were required to be produced on pain of dismissal since Mr. Mee and his attorney were responsible and the Trustee and Mr. Mee must be treated as one. The Supreme Court of the State of California, Justice Mosk dissenting, refused to grant review on August 17, 1988.

REASONS FOR GRANTING THE WRIT

Cases involving the public administration, crime and civil rights have the glamour that attracts the media, educators, and commentators on the law. However to the 90 percent of the bar that labors in the civil departments of the State Courts, cases involving the procedural due-process aspects of the conduct of trials are more important by far. For the most part the Supreme Court should (and does) leave the framing of State procedure to the State Courts, however from time to time the State Courts should be reminded that the Federal Constitution is supreme, and where State Court action transcends the boundries of the due-process clause, they are liable to reversal. This is particularly true, here, where neither the Trial Court nor the State Court of Appeal made any attempt to discuss or distinguish a Supreme Court

case declaring what they did to be unconstitutional.

1. THE RULE OF SOCIETE INTERNATIONALE v. ROGERS SHOULD BE APPLIED TO THE STATES

The instant case was dismissed because of the failure to turn over documents after an order of the Court. The only records which had any importance in this action in terms of discovery to the defendant were the records of California Land and Cattle Co. These records were in the custody and control of the Trustee in Bankruptcy. Properly, if the defendants desired these records, they should have subpoenaed the Trustee. They refused to do so, and both the Trial Court and Court of Appeal sustained them on tne grounds that the Trustee and Real Party in Interest must be treated as one and, further, that holder of cause of action was required to produce on pain of dismissal -- impossible or not.

This Court in a line of cases, commencing with Hovey v. Elliott, 167 U.S. 409; reaffirmed in Societe Internationale v. Rogers, 37 US 197, 2 L ed 2d L255; and National Hockey League v. Metropolitan Hockey Club, Inc., 427 US 639, 640, has held that dismissal of an action for failure to cooperate in discovery is a sanction of last resort that may be imposed only if the Court concludes that a party's failure to cooperate in discovery is due to willfulness, bad faith, or fault. This Court in Societe Internationale at Page 209 indicated that this Court's prior decisions:

> "establish that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

This case and the constitutional problem was specifically brought to the attention of the Trial Court and the Court of Appeal,

but this case was ignored and not discussed. In Societe Internationale and here custody and control of the documents sought were not in the litigant.

There are a myriad of situations where litigants have some real or cosmetic connection with documents that are actually within the control of some other entity. There is an A.L.R. annotation on this very subject. See City Savings Assn. v. McRik, 260 N.E.2d 110, 47 ALR 3d 670. There should be no difference between Federal Court constitution requirements and those required under the Fourteenth Amendment for State Courts. The issue is important enough for this Court to require that the State Courts proceed, constitutionally, in imposing sanctions in discovery matters.

Further, the Supreme Court of the United States in addition to its role as the top Federal Court is also the role model

for fair procedure for all the Courts in the United States. The Federal Rules of Civil Procedure, generally, and Rule 37 have had great influence in the formation of State procedural rules. The California statute involved, here, is said to have been based on Rule 37. See Crummer v. Beeler, 135 C.A.2d 851 (1960). It would be of universal benefit to the States to have the advantage of the Supreme Court's view on the fairness of procedures involved in the sanctions imposed for discovery abuses.

The unique facts of this case make it an ideal vehicle for review of these important principles.

2. PROCEDURAL DUE-PROCESS RULES SHOULD BE ESTABLISHED TO REQUIRE CLEAR ORDERS IN DISMISSALS INVOLVING DISCOVERY BY STATE COURTS

Procedural due process has always required that where a litigant is deprived

of his cause of action, there must be some kind of a hearing. See Fuentes v. Shevin, 407 US 67, 32 L Ed 2d 556, 92 S Ct 1983. However, more than a "kangaroo court" is required. When the orders of a Court with respect to discovery are vague and unclear, this Court should hold that procedural due process has been denied. The Third Circuit has given articulation to the policy which should underlie this principle. In Quality Prefabrication v. Daniel J. Keating Co., Cite as 675 F.2d 77 (1982), they stated:

> "[6] We have given this matter particular attention nonetheless, because the district court imposed the ultimate sanction, dismissal with prejudice. The reasons for desiring some articulation of the bases for decision have special importance in this context. When such a severe sanction is imposed, values of consistency and predictability, reviewability, and deterrence, see United States v. Criden, 648 F.2d at 818; National Hockey Leage, 427 U.S. at 643, 96 S.Ct. at 2781, outweigh the values of economy and efficiency that may be promoted by allowing inarticulate decisions.

> "Therefore, exercising our supervisory authority over the district courts in this judicial circuit, we hold that in the future a dismissal of a complaint with prejudice as a Rule 37 sanction must be accompanied by some articulation on the record of the court's resolution of the factual, legal, and discretionary issues presented."

In this case, the order requiring production was not in writing, and the Court of Appeal made some wild surmises as to what the order provided. The only thing that the Court made clear is that it was holding petitioner responsible for providing the California Land and Cattle Co. records, which were under the custody and control of the Trustee in Bankruptcy(R837). Some vague reference to interrogatories was included in the minute order, however no specific statement was made and plaintiff's interrogatories appear at R891-900. These answers would seem to cover all of matters postulated by the Court of Appeal. Procedural due process should require that

State Courts clearly identify their discovery requirements before imposing the ultimate sanction of dismissal. The constitutional requirement which this Court should establish would be two-fold. First, the order requiring discovery should be clear enough that the party ordered would know what compliance was required. Second, the order of dismissal should be clear enough that the Reviewing Court should not be forced to speculate as the Court of Appeal did, here.

3. THIS COURT SHOULD REVIEW THE INTERRELATION BETWEEN THE BANKRUPTCY ACT AND STATE COURT LITIGATION INVOLVING PARTIES SUBJECT TO THAT ACT

This is a classic case involving the interrelation of bankruptcy law and State litigation. The State Court of Appeal ruled that the Real Party in Interest and the Trustee in Bankruptcy must be treated as one, the Court stating:

> "Throughout this litigation, CLC has remained the named party plaintiff. Consequently, CLC as the party plaintiff must be charged with responsibility for the actions of the bankruptcy trustee, prior counsel (Mr. Liederman), and present counsel (Mr. Foster). CLC cannot shuffle its documents between its various representatives and officers in order to defeat Amstar's legitimate discovery requests."

At least one Federal Court has decided expressly to the contrary. Bon Air Hotel v. Time, 376 Fed.2d 118. The unique facts of this case are ideal for projecting the problems caused by the existence of the bankruptcy while State litigation is progressing. Here, we have a conflict of interest between a bankrupt and a trustee. In view of the astronomical increase in bankruptcies in the last 10 years, the interrelation between the bankruptcy process and State litigation should be considered by this Court.

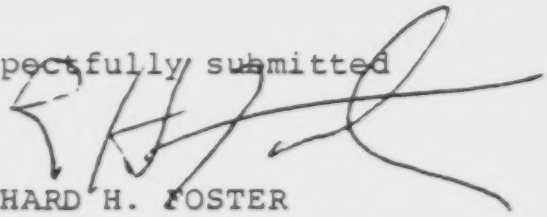
4. THIS COURT SHOULD REVIEW THE CONSTITUTIONALITY OF THE USE OF DISCOVERY PROCEDURES AS AN OFFENSIVE WEAPON TO AVOID TRIAL ON THE MERITS

The Hovey line of cases makes clear that a litigant has a constitutional right to his cause of action, and a trial on the merits. The use of discovery failures to achieve dismissal and deprive the litigant his trial on the merits has, Federally, been severely limited. Because of the constitutional requirements, the State Courts should be advised of the limits for affirmative and offensive use of discovery procedures where the object is not to discover information, but to secure dismissal by way of sanctions or the inability to economically defend.

This case involves over 1,000 pages of record where a giant law firm has sought by a blizzard of paper to obtain dismissal of a suit by a bankrupt, represented by a

sole practitioner. Amstar was not seeking information. It was using the intricacies of the discovery statutes in the classic way that our ancestoral lawyers used common law pleading. Such action has rightly been condemned. See Federal Court Discovery, 95 F.R.D. 245; Mazaroff, Surviving the Avalanche: Defendant's Discovery in Title VII Litigation, 4 Litigation 14 (1977).

Respectfully submitted



RICHARD H. FOSTER
Attorney for Petitioner

(Appendices follow)

APPENDIX A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

No. 77162

CALIFORNIA LAND AND CATTLE CO.,

Plaintiff,

v.

AMSTAR CORPORATION, SPRECKELS SUGAR DIV.,

Defendants.

[Filed October 27, 1986]

ORDER OF DISMISSAL

The motion of defendant Amstar Corporation, to dismiss this action came on regularly for hearing on October 10, 1986, the defendant Amstar Corporation, being represented by James P. Bennett of Morrison & Foerster, and the plaintiff, California Land and Cattle Company, being represented by Richard H. Foster. The Court, having received evidence, both documentary and through declaration, and

the Court being fully advised hereby finds:

1. This action was filed on July 10, 1981.

2. On May 16, 1986, Amstar Corporation initially moved to dismiss this action for lack of prosecution and plaintiff's failure to respond to document requests and interrogatories that had been served in February 1986. Amstar's motion was also based upon the failure of Mr. Thomas Mee, President of California Land and Cattle, to appear for his deposition which had originally been noticed for March 10, 1986 and twice continued to accommodate Mr. Mee. On May 30, 1986, this Court denied the motion on the condition that plaintiff provided the requested discovery within thirty days.

3. Plaintiff failed to comply with this order and as a result Amstar

renewed the motion to dismiss on August 22, 1986. On that date, this Court denied the motion on the condition that plaintiff provide the requested discovery within thirty days.

4. Plaintiff failed to comply with this Court's August 22 order and Amstar therefore renewed the motion to dismiss by written motion filed on September 23, 1986. That motion came on for hearing on October 10, 1986. As of October 10, 1986, plaintiff had not produced a single document called for by Amstar's outstanding document request nor had plaintiff properly answered Amstar's interrogatories. As of October 10, 1986 Mr. Mee had also failed to appear for his deposition noticed for October 8 and 9, 1986.

Based on these findings, IT IS HEREBY ORDERED that pursuant to Code of Civil Procedure Section 583.410, 583.420 and

2034 that the motion be, and hereby is, granted and that the action be, and hereby is dismissed with prejudice.

Dated: October 27, 1986

Richard M. Silver
Judge, Superior Court

APPENDIX B

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

No. 77162

CALIFORNIA LAND AND CATTLE CO.,

Plaintiff,

v.

AMSTAR CORPORATION, SPRECKELS SUGAR DIV.,

Defendants.

[Dated January 23, 1987]

RULING

In essence, Plaintiff seeks reconsideration of the Order of Dismissal. He presents notning new. The letter of the doctor does not justify his failure to complete the deposition. Plaintiff is correct that dismissal of cases for failure to comply with Order of Discovery is rare and should be done only in the exceptional case. Over and over I afforded Plaintiff an opportunity to comply and

cooperate. This matter is over 5 years old. Defendants, even as large as AMSTAR, have rights too. There is no basis for setting aside the prior order. The Court adopts the arguments made by defendants.

The Motion to Vacate Judgment is DENIED.

Richard M. Silver
Judge of the Superior Court

APPENDIX C

NO. H002860

CALIFORNIA COURT OF APPEAL

SIXTH APPELLATE DISTRICT

CALIFORNIA LAND AND CATTLE CO.,

Plaintiff,

v.

AMSTAR CORPORATION, SPRECKELS SUGAR DIV.,

Defendants.

[Filed May 31, 1988]

California Land and Cattle Company (ClC) appeals from a judgment of dismissal entered after the trial court granted a motion to dismiss for failure to comply with discovery orders and for lack of prosecution. (CCP §583.410, 583.420, subd. (a)(2)(A), 2034[1/].) We conclude that the

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1/ Ref. is to former C.C.P. §2034, as it reads prior to the disocvery law amendment effective July 1, 1987. (See Stats. 1982, ch. 138, §1; see also 2 Witkin, Cal. Evidence (1987 Supp.) Discovery and Production of Evid., §1426A, p. 40.)

trial court properly dismissed the action for failure to comply with discovery orders and affirm on that ground. Consequently, we do not address the respondent's alternative contention that the action was properly dismissed for lack of prosecution.

FACTS

We set out the procedural facts in considerable detail because, in our opinion, to state the facts is to virtually answer appellant's principal contention.

This action arises out of a 1976 lease agreement between appellant CLC and respondent Amstar Corporation (Amstar). Under the lease as amended, Amstar agreed to pay CLC a fixed minimum annual rental of $170 per irrigable acre for the 6,000+ acre King City Ranches held by CLC. The lease contemplated that Amstar would, in

turn, sublease the property to subtenant growers.

At the time the parties executed the lease, they also agreed to develop a water supply system which would take water from Amstar's property adjoining the King City Ranches and use it to irrigate the leased premises. Apparently, the parties anticipated that development of the water system and the general improvement in the Salinas Valley agriculture industry would allow profitable subleasing of the property. Consequently, the lease included a formula by which CLC and Amstar would share in the subrental proceeds to the extent they exceeded the minimum rent and other costs paid by Amstar.

The lease also contemplated the possibility that Amstar's rent payments and other specified costs might exceed income from sublease rentals, thereby creating a

deficit. The lease provided that if in any year the minimum rental and other expenses paid by Amstar exceeded the "net proceeds" of the rentals which Amstar in turn received from its subtenants, CLC would, at the end of the lease year, execute a secured promissory note in favor of Amstar for the amount of the deficit. The lease provided that in the event deficits accumulated over successive years, the deficit from prior years, including accrued interest thereon, would be carried forward from year to year in calculating the face amount of the renewal note CLC was required to sign at the end of each lease year.

In fact, the proceeds received from subrentals were far below the parties' expectations. Consequently, the operation of the King City Ranches under the lease has shown a deficit in all but one

year from 1977-1984, so that by 1984 CLC owed Amstar nearly $2.2 million for the accumulated deficits.

During the early years of tne agreement, CLC executed promissory notes in the amount of the accumulating deficits as required by the lease. Later, however, as the deficits grew, CLC refused to sign any additional notes.

TRIAL COURT PROCEEDINGS

CLC filed its original complaint on July 10, 1981. The complaint was served two years later, in July 1983. The original complaint was for breach of trust and alleged that Amstar was, in effect, a property manager for CLC and had breached its fiduciary duty to CLC by obtaining below market rents for its subleases. In November 1984, CLC filed a supplemental complaint. The supplemental complaint alleged, inter alia, that Amstar had mis-

managed the King City Ranches and violated contractual and tort duties owed to CLC by obtaining below market rents for its subleases. The supplemental complaint also alleged that Amstar had failed to properly account for revenues and expenses under the contract.

Amstar filed its answer to the supplemental complaint in January 1985. Thereafter, CLC took the depositions of two Amstar employees in early 1985, but did nothing else to prosecute the action until February of 1986.[2/]

Key to CLC's agrument on appeal is the fact that it filed for voluntary bankruptcy under Chapter 11 in 1982. Prior to June of 1985, CLC was a "debtor

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2/ However, CLC's attorneys and accountants had examined all of Amstar's records pertaining to the King City Ranches lease on four separate occasions during the years 1981-1985.

in possession" and, as such, its president - Thomas Mee - and its attorneys had unfettered control of the prosecution of the action. (See 3 Cowan, Bankruptcy Law and Practice (1987) § 20.6, pp. 294-296.) However, in June 1985, a trustee was appointed in the bankruptcy proceedings due in part to allegations of Mr. Mee's fraud, incompetence, and gross mismanagement of debtor affairs. The trustee then took over prosection of the lawsuit on behalf of CLC.

In February of 1986, over four and one-half years after filing of the complaint, CLC, through its bankruptcy trustee, filed an at-issue memorandum. On February 26, Amstar commenced its discovery by serving CLC with a first set of interrogatories and a companion request for production of documents. On the same date, Amstar noticed the deposition of

Mr. Mee for March 10-12, 1986; the notice directed Mr. Mee to produce documents pursuant to C.C.P. §2019, subdivision (a)(5).

The primary purpose of Amstar's discovery requests was to force CLC to particularize and produce supporting documentation for its contentions that (1) the King City Ranch property had been subleased for less than fair market value, and (2) Amstar had failed to properly account for expenses and revenue. As we explain, the trial court found that CLC persistently failed to respond to the discovery requests in a manner apprising Amstar of the factual basis for CLC's claims. Consequently, the court ultimately dismissed the action.

Throughout March of 1986, Mr. Mee's deposition was repeatedly postponed at Mee's request. In late March, shortly before CLC's responses to Amstar's interr-

ogatories were due, counsel for the bankruptcy trustee (Mr. Liederman) told defendant's counsel that he needed an extension of time to respond to the interrogatories because he had not had an opportunity to meet with Mr. Mee or to review CLC's records which he represented were in Mr. Mee's control. Mr. Liederman stated that until he could meet with Mr. Mee and review those records, his answers to Amstar's interrogatories would be "meaningless." Amstar agreed to an extension of time.

Several days later, the bankruptcy trustee filed a motion in the bankruptcy court to abandon prosecution of this action to Mr. Mee. On May 1, 1986, the United States Bankruptcy Court made an order stating that: "Stuart M. Kaplan, Trustee, be and hereby is authorized to abandon that action now pending in the

Superior Court of Monterey County, State of California, entitled California Land & Cattle Co. vs. Amstar Corp., Spreckels Sugar Division, et al., Case No. 77162, to Tom Mee as Mr. Mee's individual, after-acquired, property." At the time the motion was filed, Mr. Liederman advised counsel for respondent that due to Mee's lack of cooperation he could not provide meaningful or adequate responses to Amstar's interrogatories.

By early May 1986, Mr. Mee still had not appeared for his deposition, nor had CLC provided responses to Amstar's written discovery requests. Consequently, Amstar moved for the first time to dismiss the action for failure to comply with discovery (former C.C.P. #2034, subd. (b)(2)(C)) and for lack of prosecution (C.C.P.§§

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583.410, 583.420, subd. (a)(2)(A)).[3] CLC opposed the motion through its new counsel Mr. Foster. On May 30, the trial court denied the motion to dismiss and extended for six months the five-year period within which to bring the case to trial (to November 17, 1986).[4]

At the time it denied Amstar's motion to dismiss, the trial court gave CLC 30 days (until June 30, 1986) to respond to Amstar's interrogatories and request for production of documents. The court

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3/ These statutes permit a trial court to dismiss an action for lack of prosecution if the case is not brought to trial within three years after the action is commenced.

4/ The court tolled the five-year period because it found that it was impracticable to bring the case to trial from March 4 to May 16, 1986, due to Mr. Mee's conflict with the bankruptcy trustee and because he was effectively unrepresented by counsel during that time. (C.C.P. §583.340, subd. (c).)

warned Mr. Mee that he would be risking dismissal of the action if he did not provide adequate responses to the interrogatories and request for production of documents within 30 days. Although the court did not set a specific deadline for Mr. Mee to appear at his deposition, it indicated that the deposition should be set at Amstar's convenience.

CLC served its answers to respondent's interrogatories on June 30. The responses were prefaced by a disclaimer that they were being prepared with only limited assistance from CLC's employees (other than Mr. Mee). The responses answered the interrogatories in a general way, and did not identify the specific facts which supported CLC's claim that the subleases had been made at below market rents, or that the accounting

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procedures employed by Amstar were improper.[5/]

Counsel for Amstar met with CLC's new counsel (Mr. Foster) to advise him that he considered the responses to the interrogatories inadequate, and to demand the production of documents requested earlier. Mr. Foster responded that he had been denied access to CLC's records by the bankruptcy trustee, and that he could not provide any more detailed responses until he obtained those documents. Thus, where prior counsel (Mr. Liederman) had refused to answer interrogatories or produce

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5/ For example, in response to Amstar's request to identify the documents which CLC believed supported its claim that the parcels were subleased at less than prevailing rates, CLC responded: "Outside of documents available to experts in the field, most, if not all, documents are entirely under the control and possession of AMSTAR CORPORATION. . ." CLC did not identify a single specific document to support its claim.

records because he claimed the relevant documents were in Mr. Mee's control, Mr. Foster and CLC adopted the position that CLC and Mr. Mee could not respond because the relevant documents were within the bankruptcy trustee's control.

In addition, Mr. Mee did not appear for deposition until July 21, 1986. On that date, he sat for less than two hours at the end of which Mr. Mee's counsel unilaterally recessed the deposition because the deponent was suffering from an attack of "myasthenia gravis."

Faced with CLC's refusal to provide meaningful discovery, Amstar renewed its motion to dismiss on July 31, 1986. Alternatively, respondent sought an order to compel the production of documents and further responses to interrogatories because the relevant documents were within the control of the bankruptcy trustee,

and the trustee was not cooperating. On August 22, the trial court denied the renewed motion to dismiss but granted Amstar's alternative motion to compel further interrogatory answers and the production of documents. The trial court gave CLC 30 days (until September 21) to comply with this order. The court stated: "We know what your contentions are, we want to know the facts that support your contentions. [¶] [] I tell you what, I'll give you another 30 days to do it. And then that's it. We have to try this lawsuit, Mr. Foster, and I'm not going to try it [in] a haphazard way. They are entitled to know these things. Mr. Mee has not moved as diligently throughout the years as he should have. I'll give you 30 days to answer the interrogatories and provide the information. [¶] [] This lawsuit is set for October 20th, I think. [¶] [] And

that's barely enough time to get all this stuff together. You've got to start moving and getting these things together, Mr. Foster." (Emphasis added.)

The Court also advised Mr. Foster that if he were having trouble obtaining the documents he sought from the bankruptcy trustee, he could serve the trustee with a subpoena duces tecum or seek an appropriate order in the bankruptcy court.

Despite the court's warning, Mr. Foster did not serve the bankruptcy trustee with a subpoena duces tecum until September 17. The subpoena did not demand production of the documents until September 26, 1986 - several days beyond the 30-day deadline set by the court. In addition, on September 25, Mr. Foster served Amstar with a supplemental response to the interrogatories. This response set out the amount CLC contended

each parcel should have rented for, but did not provide facts to support those figures.

Amstar filed its third motion to dismiss on September 23, and it was heard on October 10, 1986 - ten days before the scheduled trial date. As of that date, CLC had not produced any documents, Mr. Mee had sat for only nine hours of depositions over a three-day period because of interruptions caused by his claimed medical condition,[6/] and CLC had not answered the interrogatories in a manner which explained the factual basis for their contentions. CLC's opposition to the motion stated, in essence, that they had provided adequate responses to the interrogatories and that it was impossible for them to produce the documents

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6/ Mr. Mee's deposition testimony, such as it was, failed to provide any factual basis for the claims made in the complaint.

requested since they were under the control of the bankruptcy trustee. CLC also suggested that Amstar itself had every opportunity to subpoena the documents directly from the bankruptcy trustee.

The trial court granted this third motion to dismiss, stating: "We have bent over backwards to accommodate Mr. Mee, and he has . . . continued to frustrate that discovery for one reason or another. [¶] It wasn't hard to subpoena records if the trustee had them. It's very easy for Mr. Mee to do that or his attorney and do it correctly . . . It's obvious Mr. Mee had not provided the necessary information, the basic information for Amstar to defend the action. He's continued to frustrate it for as long as I've been involved . . . I think Mr. Mee has inappropriately dealt with both Amstar and the court. So motion to dismiss will be granted on the basis as requested.."

Two months later, CLC moved to vacate the judgment under C.C.P. §473, contending it was improper to dismiss the action because the requested documents were in the control of the bankruptcy trustee and Mr. Mee had been absent from his deposition because of serious illness. The trial court concluded the motion to vacate was essentially a request for reconsideration and consequently denied it.

Thereafter, CLC filed a timely notice of appeal. (Cal. Rules of Court, rule 3(b).)

DISCUSSION

A. The Trial Court Did Not Abuse Its Discretionary Power To Dismiss The Action Under Former Code of Civil Procedure Section 2034

Former Code of Civil Procedure section 2034 vests the trial court with broad discretion to formulate and impose sanctions for willful failure to comply with discovery orders. (See 2 Witkin, Cal.Evidence

(3d ed. 1986) Discovery and Production of Evidence, §§ 1580, 1589, 1594, 1595.) "The power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action." (Calvert Fire Ins. Co. v. Cropper (1983) 141 Cal.App.3d 901, 904.)

"The sanction of dismissal or the rendition of a default judgment against the disobedient party is ordinarily a drastic measure which should be employed with caution. [Citation.] However, there is no question that a court is empowered to apply the ultimate sanction against a litigant who persists in the outright refusal to comply with his discovery obligations. [Citation.] The refusal to reveal material evidence is deemed to be an admission that the claim . . . is without merit. [Citations.]" (Deyo v. Kilbourne (1978) 84 Cal.App.3d 771, 793-794, fn. omitted;

Karz v. Karl (1982) 137 Cal.App.3d 637, 648-649.) Moreover, "it has long been recognized that a willful failure to obey an order requiring further answers to interrogatories, by filing evasive and incomplete further answers, can justify the sanction of dismissal." (Karz v. Karl, supra, 137 Cal.App.3d at p.648; see also Deyo v. Kilbourne, supra, 84 Cal.App.3d at pp.795-5796 and cases there summarized.)

In the present case, CLC persistently failed to supply meaningful answers to Amstar's interrogatories and to produce the documents which supported its claims. CLC

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was served with Amstar's interrogatories and document requests in February 1986.[7/] The trial court twice directed CLC to comply with these discovery requests. In each instance, CLC failed to heed specific directives to provide meaningful interrogatory responses and to produce documents.

In Williams v. Travelers Ins. Co.(1975) 49 Cal.App.3d 805, the appellate court affirmed a judgment of dismissal on facts

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7/ CLC cannot justify its failure to provide appropriate responses because Amstar sought discovery late in the litigation. As a defendant, Amstar had legitimate tactical reasons for waiting to begin the discovery process: "An important aspect of legitimate discovery from a defendant's point of view is the ascertainment, in advance of trial, of the specific components of plaintiff's case so that appropriate preparations can be made to meet them . . . To be useful, such discovery should be conducted as late as possible in the preparation of the case so that it will reflect plaintiff's final choice of evidence to be presented." (Karz v. Karl, supra, 137 Cal.App.3d at p. 650.)

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similar to those in the present case. In Williams, the plaintiff (Williams) failed to properly answer a set of interrogatories. On three occasions, the trial court ordered the plaintiff to provide adequate responses to the interrogatories. (Id. at pp.808-809.) Plaintiff did not heed the court's orders, and the action was dismissed. In affirming the dismissal, the Court of Appeal stated: "With respect to answers to interrogatories, the court showed extreme liberality in giving Williams two additional opportunities to provide appropriate answers after he had failed to do so for an unexcused and unexplained six-month period . . . Williams' refusal to answer interrogatories that went to the heart of his claim against [the defendant] justified the dismissal of his complaint." (Id. at pp.810-811.)

Similarly, in the present case,

the trial court gave CLC two additional opportunities to provide answers to interrogatories and produce documents after CLC initially failed to respond to Amstar's discovery requests. Overall, CLC had nearly eight months to produce the requested documents and provide adequate answers; nevertheless, CLC never met its discovery obligations. Moreover, the information and documents requested "went to the heart" of CLC's claim against Amstar; plainly, Amstar had a right to be informed of the facts CLC intended to prove at trial to support its claim that Amstar (1) subleased the property for below market rents, and (2) improperly accounted for revenues and expenses. (Karz v. Karl, supra, 137 Cal.App.3d at p.650 [defendant may legitimately seek to discover the details of the case it will be called upon to meet].) CLC's actions justified dismissal of the complaint.

Appellant contends the trial court abused its discretion when it granted the dismissal because: (1) the documents necessary to provide the requested discovery were in the control of the bankruptcy trustee; (2) it was Amstar's responsibility to subpoena these documents directly from the trustee; and (3) Mr. Mee's failure to sit or appear for deposition was excused by medical necessity.[8/]

CLC's failure to provide any meaningful responses to Amstar's interrogatories or produce any documents in response to Amstar's request cannot be excused on the ground CLC did not have custody or control of its own documents. In March of 1986, Mr. Liederman, acting as counsel for CLC at the direction of the bankruptcy trustee,

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8/ In its briefs CLC does not contend that the responses were adequate or that the relevant documents had been produced.

took the position that CLC could not provide discovery because the requisite documents and information were within the custody and control of Mr. Mee. Once the trustee abandoned prosecution of this case, the story was reversed. At that point, CLC and its new counsel (Mr. Foster) refused to provide discovery on the ground that the trustee and its counsel had possession of the relevant documents.

Throughout this litigation, CLC has remained the named party plaintiff. Consequently, CLC as the party plaintiff must be charged with responsibility for the actions of the bankruptcy trustee, prior counsel (Mr. Liederman), and present counsel (Mr. Foster). CLC cannot shuffle its documents between its various representatives and officers in order to defeat Amstar's legitimate discovery requests.

CLC next argues that Amstar itself

was required to subpoena the documents it desired directly from the bankruptcy trustee, and that CLC cannot be forced to do Amstar's discovery work. In making this argument, CLC misapprehends the nature of Amstar's request for documents. Amstar did not identify and request specific documents which it was already aware of and wished to obtain. Instead, Amstar sought the production of all documents which CLC intended to rely on to support the allegations it had made.[9/] Consequently, since prosecution of the lawsuit nad been abandoned to Mr. Mee, it would have been futile for Amstar to subpoena the bankruptcy trustee to obtain

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9/ The interrogatories asked CLC to identify the documents it claimed supported its contentions; the request for production of documents demanded that "plaintiff produce and permit the inspection and copying of all documents you identify in your responses to Amstar's first set of interrogatories..."

the documents Mr. Mee and his counsel intended to rely on in prosecuting the action. Since the bankruptcy trustee was no longer prosecuting the action, the trustee had no way of knowing what documents CLC would ultimately rely on in proving its claim. Thus, CLC's suggestion that Amstar could have served a subpoena directly on the bankruptcy trustee to obtain the documents it wanted makes no sense given the nature of Amstar's request for production of documents. In any event, Amstar had a right to obtain discovery using any or all statutory procedures available.

The bottom line is that CLC never provided Amstar with the information it needed to determine the specific components of CLC's case so that appropriate preparations could be made to meet them. "It is impossible to discover this [information] other than from the plaintiff." (Karz v. Karl,

supra, 137 Cal.App.3d at p. 650.) CLC's failure to reveal the material facts which support its contentions is, in effect, an admission that the suit lacks merit. (Devo v. Kilbourne, supra, 84 Cal.App.3d at p.793.) Consequently, dismissal was completely appropriate.

Appellant's final argument is a red herring. Even if we assume Mr. Mee's decision to cut off his depositions and his failure to appear at later scheduled depositions was justified by medical necessity, this does not excuse appellant's failure to apprise Amstar of tne facts underlying its contentions through other means; namely, its answer to interrogatories and production of documents. In short, the trial court did not dismiss the action because Mr. Mee failed to appear for his depositions; rather, the trial court dismissed the action because CLC had not provided Amstar with

the basic information necessary to defend the action through any means.

The trial court did not abuse its discretion in dismissing the action for failure to comply with discovery orders.

Since we conclude dismissal was justified on the grounds specified above, we do not address Amstar's alternative contention that dismissal was also justified under C.C.P. Sections 583.410 and 583.420.

B. The Trial Court Did Not Err By Denying Appellant's Motion For Relief Under C.C.P. §473

Appellant argues that it was entitled to relief from the order of dismissal under C.C.P. §473. This section provides in relevant part that "[t]he court may, upon such terms as may be just, relieve a party . . . from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect." The principal thrust

of CLC's argument on appeal is that it did not have sufficient time prior to the October 10, 1986 hearing to obtain the records from the trustee in bankruptcy through subpoena or other means. Consequently, they argue the failure to produce documents and answer interrogatories was "inadvertent" and should be excused. We disagree.

At the August 22, 1986 hearing, seven weeks prior to dismissal, the trial court had explicitly directed CLC to use whatever means were necessary to obtain the relevant documents within 30 days. The Court suggested that CLC obtain an order in the bankruptcy court, or, alternatively, that it subpoena the documents from the trustee. No motion was made in the bankruptcy court, and CLC did not subpoena the documents until September 26. Moreover, CLC did not file an order to show cause to force the bankruptcy trustee to comply with the

subpoena when he failed to produce the requested documents.

An order denying a motion for relief from default under Section 473 may be reversed only for mainfest abuse of discretion. (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, §§ 275-276, pp. 286-287.) Here, the trial court was entitled to find that CLC's failure to produce the documents within the time allowed was due to its own dilatory behavior, and not to justified inadvertence. There was no abuse of discretion. (See Davis v. Kay (1973) 34 Cal.App.3d 680, 683-684 ["The inadvertence referred to in section 473 is not inadvertence in the abstract but it must be inadvertence which is satisfactory."].)

C. The Issue of Compound Interest Is Moot

In its supplemental complaint, CLC alleged Amstar had breached the terms of

the lease agreement by including accrued interest in the face amount of the annual notes which CLC executed in the early years of the lease. The supplemental complaint alleged that the lease agreement did not provide for interest to be compounded in this manner.

CLC moved for an order determining this issue to be without substantial controversy in July of 1986, and the motion was denied on September 2, 1986.

Given that we have decided the action was properly dismissed for failure to comply with discovery orders, CLC's argument that its motion should have been granted is moot. An order determining that this specific issue was without substantial controversy would not have survived the judgment of dismissal.

The judgment is affirmed.

Chapman, J.*

WE CONCUR:

Agliano, P.J.

Capaccioli, J.

CALIFORNIA LAND AND CATTLE CO. v.

AMSTAR CORPORATION

No. H002860

* Assigned by the Chairperson of the Judicial Council.

APPENDIX D

ORDER DENYING REVIEW

AFTER JUDGMENT BY

THE COURT OF APPEAL

6th District, No. H002860

S006335

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

I N B A N K

CALIFORNIA LAND AND CATTLE COMPANY,
Petitioner,

v.

AMSTAR CORPORATION et al.,
Respondents.

[Filed August 17 1988]

Petition for review DENIED.

Mosk, J., is of the opinion the petition should be granted.

LUCAS
Chief Justice